SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled case on June 2, 1966.

Citations to Opinions

The judgment of the New York Court of Appeals, affirming without opinion the convictions of the seventeen petitioners, is unreported and is reproduced *infra,* p. A-1. The opinion of the Appellate Term, Supreme Court of the State of New York, First Department, together with the concurring and dissenting opinions therein, are reported at 48 Misc. 2d 611, 265 N. Y. Supp. 2d 841 (reproduced *infra*

A-5, 32, 33). No opinion was issued by the trial court, the Criminal Court of the City of New York.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 2, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

Questions Presented for Review

1. Whether the petitioners were convicted without the due process of law guaranteed by the Fourteenth Amendment, because they were convicted without notice of the charges against them.

2. Whether petitioners' convictions for holding a street meeting to peacefully express political dissent, violate the guarantees of freedom of speech and assembly embodied in the due process guarantee of the Fourteenth Amendment.

3. Whether subdivisions 2, 3, and 4 of Section 722 of the Penal Law of New York State, under which petitioners were convicted, are so vague and uncertain as applied to street meetings, that they violate the due process guarantee of the Fourteenth Amendment.

Statute Involved

Section 722 of the Penal Law of the State of New York (Laws of 1923, c. 642, Sec. 1, as amended; McKinney's Consolidated Laws of New York, Book 39, Part 1) provides:

"Disorderly Conduct.

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: • • •

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd; • • • ".

Statement of the Case

The Complaint

The complaint against petitioners in the Criminal Court of the City of New York charged that "at 4.25 p.m. on August 8, 1964, vicinity Duffy Square—47 St. and B'way . . . the defendants did unlawfully congregate and assemble at the above location obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so after being informed that their actions were not lawful"; and that defendants thereby violated section 722, subdivisions 2, 3 and 4 of the Penal Law of the State of New York (R. 6).

Summary of Facts

According to the undisputed evidence, the street meeting leading to petitioners' convictions was held to protest the American policy in the Vietnam war, under the auspices of a group called the "May 2nd Movement", which had been formed a few months previously at Yale University (A-5, *infra;* T. 240-241, 321).[1] Duffy Square, where the meeting was held on a Saturday afternoon at about 4 o'clock, is a triangular area in midtown Manhattan, extending the length of one block, from 46th to 47th Streets. Towards both the 46th and 47th Street ends are statues, hedges, and railings; the large paved center section is unused and unbroken save for a subway grating (T. 263-264). Pedestrian traffic to and from the Square is permitted only at crosswalks at the 46th and 47th Street extremities, well-separated from the open center section by the statuary and fixtures.[2]

The speakers at the meeting stood on the steps leading to a statue of Father Duffy towards the northern end of the Square, with the audience in the center section (T. 282-284). Petitioners offered to prove that meetings for various causes such as bond rallies have been held in that section (T. 261-265).

One of the petitioners, acting as chairman, began the meeting, stating that "under the auspices of the May 2nd Movement we are here to have a peaceful meeting" (T. 59, 61, 66). After only a few minutes of speeches about the

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[1] "T." refers to the transcript of the trial, filed as part of the record in this Court.

[2] A photograph of Duffy Square was introduced in evidence as People's Exhibit 1 (T. 20-21); a similar photograph is filed in this Court with the record, by stipulation of counsel.

war in Vietnam, a police captain approached the speakers and ordered them to disperse the assembly. The chairman declared that the meeting should be allowed to proceed; the captain withdrew while the speeches continued; he returned after a few moments; he repeated his order and the chairman repeated his reply (T. 67-71). The police captain apparently had arranged for the physical dispersion of the meeting: suddenly, two policemen on horseback rode into the center of the Square where the audience was standing, to force its dispersion, accompanied by approximately a dozen foot patrolmen (T. 78-80, 85). As a chief prosecution witness testified: "Then the horses came on behind the foot patrolmen . . . That's when everybody started shouting and yelling and running" (T. 71-72). The petitioners tried to avoid the horses and to continue the meeting for some minutes until the police stated they were under arrest (as to their conduct during the police effort to force their dispersion, see *infra* pp. 8-9).

There was evidence that the police had pre-determined to break up the meeting (on the basis of a police policy later abandoned, and never acknowledged in court, to prohibit meetings for political dissent throughout a large area, regardless of traffic conditions).[3] Nevertheless, the prosecution attempted to prove, in an effort to justify the dis-

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[3] See T. 379, 274-275; and 302-303, 287-290 as to the police captain's failure to refer to traffic in his order to disperse. The policeman who recorded the meeting on a concealed miniphone, omitted the captain's remarks in the recording he played in Court (T. 68), and the prosecution failed to call the police captain as a witness; there was hearsay testimony only, admitted over objection, that he referred to traffic conditions in his order (T. 22-23). The trial court foreclosed proof as to the stated reason for the dispersal of the meeting (T. 89-90; see dissent, *infra* A-34).

persal order, that the meeting was interfering with pedestrian and vehicular traffic.

The only entirely disinterested witness to the meeting was a reporter from the *New York Times,* who was unacquainted with petitioners and present solely in a reportorial capacity, called by the defense (T. 279-281). Although other newsmen also attended the meeting (T. 282), the prosecution called only the participating policemen, its chief witnesses being two officers attached to the Police Department's Bureau of Special Services, who had had the speakers and previous meetings under surveillance (T. 18-19, 29).

The *New York Times* reporter testified that the meeting was peaceful, orderly, small relative to the size of the center area of the Square where it was held, and not "attracting very much attention at all" until the advent of the horses (T. 305, 282-286). Since the center section of the Square concededly was large enough to accommodate many more than the audience at its maximum estimate,[4] the prosecution contention was that the audience pressed forward towards the Father Duffy statue to hear the speakers; that consequently a few of the auditors stood in the gutter and the audience filled the Square from curb to curb, at a point near the speakers; that pedestrians walking north to south or vice versa therefore had to walk in the gutter at this point; and because of the people in the street that the automobiles had to "veer" from one lane to another in the adjacent broad avenues (each having a number of traffic lanes) (T. 27-28, 213-214).

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[4] Estimates of the number in the audience varied from 60 by the New York Times reporter, to 200 by the chief prosecution witness (T. 285, 26-27).

Even if the truth of this testimony is assumed—despite its overall contradiction by the *Times* reporter and numerous indications that it was contrived to fit the claim that the dispersal order was based on traffic conditions rather than pre-determined—the police captain admittedly gave no suggestion or order that the audience narrow itself in the Square as an alternative to dispersal. Further, the maximum inconvenience possible for pedestrians from the alleged curb-to-curb audience, was that they would have been forced to use the cross-walk at one end of the Square instead of proceeding to that at the other.

As to the conduct of the audience during the speeches, before the dispersal order, there was occasional handclapping (T. 67, 69) and according to the *Times* reporter "ordinary cheering . . . not particularly restrained, but I would not say it was a ruckus, or shrill, or anything like that" (T. 286).[5]

The prosecution testimony that thousands of pedestrians on the sidewalks facing the Square stopped to look at the meeting (T. 211-212) is wholly incredible, considering the *Times* reporter's testimony that the meeting attracted little attention and considering that it was uneventful prior to the advent of the horses. The Appellate Term opinion seems to assume that this prosecution testimony referred to the period after the order to disperse (*infra* A-7). In any event, even if such an occurrence could be relevant to petitioners' convictions,[6] there is no indication that the

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[5] One of the Bureau of Special Services policemen testified that before the meeting began a group of unspecified size chanted " 'Down with American imperialism' and 'Stop the war in Vietnam' and things of that nature" (T. 210). However, there was no indication that the alleged chant could be considered a disturbance of the peace.

[6] See *Edwards* v. *South Carolina*, 372 U. S. 229, 237.

alleged viewing of the meeting caused or threatened any obstruction or disturbance.

Most of the prosecution evidence related to the acts of individual petitioners in the period of the police effort to physically disperse them, between the advent of the horses into the Square and petitioners' arrests. Nine of the prosecution's eleven witnesses were policemen who had come to the Square only at the time of the dispersal order, each testifying as to additional individual acts.[1] There was no evidence of acts of violence, profanity or obscenity by petitioners, their most opprobrious term being "fascist police" or "fascist cop" as the policemen tried to drive them off the Square. While the policemen described petitioners as running around in the Square and "screaming", their "screaming" consisted mainly of declarations and calls to each other, as they scattered to avoid the horses, as to their right to continue the meeting (e.g., T. 82-85, 93-94). They submitted to arrest as soon as the police sought to arrest them. For example, the officer who arrested petitioner Rhoads testified:

> "There was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' and this and that and I observed Rhoads running towards the steps of the Square itself and I followed him up and told him he would have to leave the Square. If he didn't, he would have to be placed under arrest because he was part of the general disturbance there and he said he didn't want to leave and I told him if he didn't leave the second time I was going to place

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[1] None of these acts were included in the charges, and the evidence thereof should have been excluded in response to petitioners' due process objection (see *infra* pp. 12-14).

him under arrest and I placed him under arrest and I took him down from the center of Duffy Square by the monument there" (T. 105).

Similarly the officer who arrested petitioner Gellis testified:

> "I said, 'Please move along. You are not accomplishing anything by standing here.' Again he ranted, 'You can't tell me what to do. I have my rights.' I said, 'Mister, I am going to arrest you if you don't move on', and he said, 'Go ahead and arrest me.' . . . Q. All right, what happened then? A. I informed him I placed him under arrest and walked across in front of the Square, which would be the south of the Square, and placed him in a cab" (T. 142-143).

The policemen emphasized that petitioner Maher hit one of the police horses with a rolled-up cardboard placard (T. 190). Mr. Maher testified without contradiction that he was attempting to keep the horse from trampling on another young man who had stumbled and was lying near the horse's feet (T. 322-328). None of the petitioners had or used any type of implement other than Mr. Maher's use of the rolled placard (see T. 297).[8]

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[8] Several policemen claimed that petitioners Kunis and Eckhardt, who worked together as puppeteers and brought with them a puppet symbolizing anti-militarism, ran into the street after the order to disperse and lay down in the middle of Broadway (T. 127-128, 98-99). The petitioners testified that Kunis lay on the sidewalk and entirely denied the allegation as to Eckhardt (T. 354-355, 392, 407, 421-423). The *Times* reporter testified that he was "not sure if it was on the street or sidewalk" that he saw a person lying (T. 305).

Presentation of Federal Questions in State Courts

The amended remittitur of the New York Court of Appeals, the State court of last resort, states: "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that (1) their convictions violated the due process guarantee of the Fourteenth Amendment because they were based in whole or part on acts which were not charged in the complaint; (2) their convictions violated their Constitutional rights of free speech and free assembly, and (3) their convictions under subdivisions 2, 3 and 4 of section 722 of the Penal Law violated the due process guarantee of the Fourteenth Amendment because of vagueness. The Court of Appeals held that appellants' Constitutional rights were in no way violated" (*infra* A-2). The points listed by the Court were presented to it in petitioners' briefs and oral argument.

As to the lower State courts, the first point presented to this Court for review—that petitioners were convicted for acts that had not been charged against them—was raised repeatedly in objections to the introduction of evidence in the trial court (T. 39-40, 53, 103-104). Thus, petitioners' attorney objected

> "to any testimony as to the occurrences after Captain McAllister attempted to disperse this meeting, on the grounds that they are not within the allegations of the complaint. It would be a violation of due process to try people on charges which have not been alleged and which they have not had notice and are not included in the sworn complaints . . . " (T. 103-104).

And in argument to the trial court at the conclusion of the trial, counsel stated:

> "Again, at the risk of repetition, I want to say that the complaint is obviously based on the conduct of the whole group. There is no implication in these charges whatsoever, that there would be any attempt to prove . . . or that there would be any evidence about individual physical acts, as to which testimony has been admitted; . . . therefore there can be no conviction based on those acts consistent with due process of law" (T. 500).

In the lower appellate court, the Appellate Term of the Supreme Court of the State of New York (hereinafter called Appellate Term), petitioners' briefs presented the point as a matter of State and Federal due process. One judge rejected it *sub silentio* (A-16 *infra*); one judge may or may not have considered it (A-33); and the dissenting judge accepted this Constitutional argument, relying on the decisions of this Court as to Federal due process (A-37).

The second question presented for review here—that the convictions violate the guarantees of freedom of speech and assembly—was argued to the trial court. Petitioners' attorney asserted that "conviction on the evidence that has been presented would violate the State and Federal constitutional guarantees of free speech and free assembly" (T. 487) and quoted at length from this Court's decisions under the Fourteenth Amendment, in particular *Edwards* v. *South Carolina*, 372 U. S. 229 (T. 495). The Federal Constitutional point was presented in brief and oral argument to the Appellate Term; the Court's opinion explicitly

rejected it (A-23-25) and the dissenting opinion explicitly accepted it (A-35-38).

The third Constitutional question, as to the vagueness of the statute, was presented by brief in the Appellate Term, which rejected it (A-15-16).

Reasons for granting the writ: the State courts have decided Federal questions of importance to the maintenance of due process and freedom of expression, in a manner contradictory to this Court's decisions.

I.

The State courts refused to abide by the principle that "conviction upon a charge not made would be a sheer denial of due process." *DeJonge* v. *Oregon*, 299 U. S. 353, 362. See also *Garner* v. *Louisiana*, 368 U. S. 157, 164; *Thompson* v. *Louisville*, 362 U. S. 199, 206; *Cole* v. *Arkansas*, 333 U. S. 196, 201. In *DeJonge*, due process limited the courts to consideration of the charged act, though there as here the State might have accused the defendant, considering the evidence introduced against him, of other acts violative of the statute under which he was convicted (299 U. S. at pp. 362, 360; Record on Appeal in this Court, pp. 20-31).

Certainly the complaint here gave no notice to petitioners that they were charged with the individual misfeasances subsequent to the dispersal order that predominated in the prosecution testimony, such as hitting a police horse or lying in the street.[8a] Rather, as the dissenting judge in Appellate Term pointed out, the complaint was an "omnibus charge made against all" petitioners for acts

[8a] Compare *Russell* v. *United States*, 369 U. S. 749, 764.

in common during the meeting (A-36), raising the issue of whether they could consistently with the First Amendment be punished for holding the assembly and failing to move on.

Grant of this petition is important because the *DeJonge* principle was here transgressed in ways that this Court has not yet reviewed. In the first place, evidence of acts other than those charged was continually introduced over petitioners' due process objection. If the purported individual misfeasances had been charged in the complaint, petitioners would have been on notice of the need to move for separate trials to avoid confusion and prejudice to one petitioner from the claimed acts of another.

The petitioners apparently were convicted, and their convictions upheld, in whole or part on the basis of uncharged purported acts.[9] Throughout the proceedings however, petitioners have been unable to know definitely of what each was convicted. Concomitant with the basic due process violation, petitioners were deprived at the trial of the clarity in the determination of guilt that is derived from a judge or jury's focus on charged acts. And on their appeals they were deprived of the benefit of the courts' knowledge of the basis of their conviction, with review on that basis (compare *Ashton* v. *Kentucky*, 384 U. S. 195, 198; *Kent* v. *United States*, 383 U. S. 541, 561; *Frank* v. *Mangum*, 237 U. S. 309, 327).

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[9] The trial judge and the Court of Appeals indicated that they viewed these acts as the partial or total basis for conviction, in that they overruled petitioners' due process objection (*supra*, p. 10; *infra*, A-2). And see Appellate Term opinion as to these acts, *infra*, A-19-20.

Grant of this petition is further warranted because the due process violation is here interwoven with First Amendment rights. Just as due process in regard to the certainty and definiteness of a statute is of particular importance when First Amendment rights are at stake,[10] so also is the due process principle here involved. A frequent instrument for arrests arising from expression of unpopular opinion is, as here, an umbrella statute embracing numerous types of violations (e.g., *Cox* v. *Louisiana*, 379 U. S. 536; *Edwards* v. *South Carolina*, 372 U. S. 229; *Ashton*, 384 U. S. at p. 199). Thus, a shift to some other alleged violation under the same statute is a special threat in the First Amendment area, in the event that the original charge comes to appear unsupported or vulnerable to Constitutional challenge (e.g., *Cole* v. *Arkansas; DeJonge* v. *Oregon, supra*). The hazard of asserting First Amendment rights increases if the individual is subject to such an unfair prosecutorial advantage, and if interference with free expression can be justified on the basis of an afterthought, as attempted in the case at bar.

II.

Protection of the minority's right of expression on issues of national importance, requires this Court's consideration of the second point presented for review. The question is whether, as the dissenting judge in Appellate Term asserted, "a fundamental right was suppressed under guise of preserving order" (A-37, *infra*).

Insistence on a showing by the State of a real and substantial inconvenience in other street uses, is the only means

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[10] *Ashton*, 384 U. S. at p. 200, n. 2; *Burstyn* v. *Wilson*, 343 U. S. 495, 505-506.

of preventing discrimination against unpopular causes when assemblies are regulated under a broad statute (compare *Cox*, 379 U. S. at p. 558, and opinion by Mr. Justice Black, at pp. 577-581; *Edwards*, 372 U. S. at p. 236). The petitioners' offer of proof that use of Duffy Square was permitted for popular causes such as bond rallies, was rejected; but in any event, it would be difficult to prove that a meeting by a minority was prohibited under precisely the same traffic conditions as a popular assembly was permitted. Political dissent must therefore rely for equal protection upon enforcement of the principle that the State must refrain from suppressing expression unless it causes a real and substantial interference with other uses of the street.

Here this standard was decimated. The only judge who explicitly ruled that the order to disperse was reasonable, upheld it merely on the basis of the general power of the State to prevent disorder "in heavily-trafficked areas where vehicles and pedestrians are or may be obstructed" (*infra*, A-23-24).[11]

Because the meeting was held four or five blocks from Times Square,[12] the Appellate Term opinion emphasized, as have the prosecution briefs, the sentence in this Court's *Cox* opinion that one could not "contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour . . . " (A-25). But this Court did not mean, as is apparent from *Cox* itself (see 379 U. S. at p. 548, n. 12; p. 550), that controlling principles as to First Amendment rights can be abandoned and that un-

[11] The trial judge gave no indication of whether, or what, inconvenience in the use of the streets justified the order to disperse.

[12] While "Times Square" itself is a block occupied by a building, the surrounding area is sometimes referred to by that name.

popular meetings—either for civil rights in the South or "leftist" views in the North—can be relegated to inconspicuous locations, with the conspicuous reserved for popular causes. Under this Court's opinions, the right to dissent is the right to try to persuade others, so long as the dissenters cause no substantial inconvenience in other street uses.

The testimony of the *New York Times* reporter, the only disinterested witness, that the meeting was peaceful, orderly, small relative to the dimensions of the open and unused section of the Square, posing no threat or inconvenience and indeed attracting little attention, stands without any substantial contradiction. As the dissenting judge in Appellate Term said: "No one had indicated any purpose other than by word of mouth to draw attention to the sponsors' opposition to the Viet Nam war. All was peaceful—neither pedestrian nor vehicular traffic had been perceptibly slowed—certainly neither was halted" (*infra*, A-34).

Assuming the credibility of the prosecution testimony that auditors and pedestrians stood or walked in the street bordering one part of the Square, the order to disperse was nevertheless unjustifiable. If the police in good faith had been concerned with this alleged traffic situation, they could have easily, and doubtless would have, ordered a slight narrowing of the gathering on the Square—considering the large cleared area available and the entirely peaceful character of the assembly prior to the advent of the horses (compare *Edwards*, 372 U. S. at p. 232, n. 5). Under this Court's doctrines, a measure less suppressive of First Amendment rights than the drastic order to disperse, should have been given; a slight irregularity in traffic condi-

tions, of a type commonly tolerated or regulated, cannot be used to justify suppression of minority opinion.

Since the meeting was a lawful exercise of First Amendment rights and the order to disperse unconstitutional, the State cannot punish the petitioners' failure to obey it. See *Shuttleworth* v. *Birmingham*, 382 U. S. 87; *Henry* v. *City of Rock Hill*, 376 U. S. 776, 777; *Cox, supra*, 379 U. S. at pp. 543-544; *Edwards, supra*, 372 U. S. at p. 233.

Assuming *arguendo* that petitioners' acts following the dispersal order are in issue, this Court's review of whether they fall within the protection of due process and the First Amendment seems essential. What the Appellate Term opinion characterizes as "inciting to disorder" and "generally causing bedlam" (A-19, *infra*), were petitioners' reasonable efforts to continue their meeting. The police did not permit petitioners merely to stand their ground and submit to arrest; the "commotion which inevitably ensued was the result of the gratuitous and forcible invasion of the rally by the police—not the conduct of the defendants . . . the efficient, moving cause of any disturbance was the unlawful police action" (A-36, *infra*, dissent in Appellate Term). If charges can be leveled on the basis of reasonable efforts to continue a lawful meeting and of reactions occasioned by police methods of enforcing an order to move on, a new method of frustrating First Amendment rights will be initiated.

CONCLUSION

It is respectfully submitted that this petition should be granted.

Respectfully submitted,

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July, 1966

APPENDIX

APPENDIX

Judgment of the Court of Appeals of the State of New York

People of the State of New York against William Turner and others.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Whereup the said Court of Appeals having heard this cause argued by Nanette Dembitz, of counsel for the appellants and by Mr. Frederick P. Hafetz, of counsel for respondent, and after due deliberation had thereon, do order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

June 2, 1966

Amendment of Remittitur by New York Court of Appeals

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that (1) their convictions violated the due process guarantee of the Fourteenth Amendment because they were based in whole or part on acts which were not charged in the complaint; (2) their convictions violated their Constitutional rights of free speech and free assembly, and (3) their convictions under subdivisions 2, 3 and 4 of section 722 of the Penal Law violated the due process guarantee of the Fourteenth Amendment because of vagueness. The Court of Appeals held that appellants' Constitutional rights were in no way violated.

AND the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

[SEAL]

July 7, 1966

Judgment of Appellate Term of the Supreme Court, First Department, dated November 12, 1965

Present: Hon. Louis J. Capozzoli, J.P.
" " Samuel H. Hofstadter (dissenting)
" " William C. Hecht, Jr., Justice

May #145

The People of the State of New York,

Respondent,

vs.

William Turner, et al.,

Defendants-Appellants.

An appeal having been taken in this Court by William Turner, et al., the defendants appellants, from a judgments of conviction by Hon. Vincent R. Impellitteri, a Judge of the New York City Criminal Court, upon the charge of violating §722, subs. 2, 3 & 4 of the Penal Law, entered on the 2nd day of October, 1964, and said defendants appellants having been sentenced by Hon. Samuel J. Ohringer, a Judge of said Court on the 18th day of November, 1964, as follows:

> Defts. Maher, Laub, Rhoads, Ostrow, Shallitt, Copeland and Teahan $25 or 5 days. Remaining defendants suspended sentences. Sentences of all defendants except Maher, Laub and Copeland, suspended and the said appeal having been heard and the deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgments so appealed from be and the same are hereby affirmed.

Enter

L. J. C.
Justice Appellate Term
Supreme Court, First Department

Opinions in Appellate Term, Supreme Court, First Department

HECHT, J.:

The convictions all spring from a public meeting held by the so-called "May 2nd Movement", an organization formed at Yale University in March, 1964, for the purpose of protesting American involvement in the war in Viet Nam. The meeting was held in Duffy Square, an island located at the intersection of Broadway and Seventh Avenue and bounded by 46th and 47th Streets.

The prosecution's witness, Detective Behr, testified that on August 8, 1964, at approximately 4:00 P. M., the defendant Laub "mounted the steps on the southern end of the statue" located in Duffy Square and proceeded to speak through a "battery-powered megaphone" which provided loud amplification. The witness added:

> "He (Laub) stated that the May 2nd movement had called this meeting and then proceeded to introduce Mr. Philip Luce, whom he stated would be the chairman for this meeting. Mr. Luce began to speak. At this point, representatives of the Police Department, a captain and an inspector, spoke to Mr. Luce, Mr. Laub, Mr. Maher, and, I believe, also Mr. Copeland.
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> • • • • • •
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> "The police captain informed Mr. Laub, Mr. Maher, and Mr. Mopeland [sic], and Mr. Luce, that at the present time the demonstration was interfering with pedestrian and vehicular traffic; that people had to walk into the street to get by."
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> • • • • • •

"That in view of this interference with pedestrian and vehicular traffic, that the meeting would have to be terminated at this location at this time.

"Mr. Laub then took the battery-operated megaphone again and put it up to his mouth and proceeded to speak into it and spoke to the people assembled there. There were approximately two hundred people assembled there. He stated to them that this captain—I believe he stated, 'The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here.'

"Then he informed the people that in spite of this, they would continue their demonstration and he again gave—I believe he gave the megaphone to Mr. Copeland—no, to Mr. Luce, again. Mr. Luce then continued to speak and introduce Mr. Vincent Copeland. Mr. Copeland spoke into another battery-operated megaphone which he carried. He spoke to the people there, speaking of the crimes of American imperialism against the working people."

The captain again told the four above-named defendants that the demonstration interfered with pedestrian and vehicular traffic and had to be terminated, and again the defendant Laub announced his defiance of this request.

Behr further testified that in the area surrounding the Square there were approximately 4,000 to 5,000 people. Pedestrians "were forced to go into the street to walk around the people assembled * * * for the demonstration" and cars veered sharply right on Broadway and left on Seventh Avenue "to avoid persons who were in the street walking north and south around the demonstration". Some

of the demonstrators, including some defendants, were in the street. There was chanting and shouting ("Let him speak") and drums beating and the defendant Maher struck a police horse with a rolled-up placard. There were 15 or 16 police officers present, two of whom were on horseback. Some pedestrians complained to the police of having to walk in the streets. "There was a lot of shouting going on" but Behr did not know which of the defendants were shouting or what they were shouting prior to the police captain's order to disperse.

Patrolman Koopman testified that after the second command was defied by Laub:

> "• • • the captain directed the ten patrolmen and one sergeant, who were across the street, to come over and disperse the crowd and also the two officers on horses and they came to the crowd from the Seventh Avenue side and they started telling everybody to disperse and at that time—then the horses came on behind the foot patrolmen and then Mr. Maher ran past me and ran over to one of the horses and started smacking it with some kind of a sign, or something. I don't know what he was hitting it with. That's when everybody started shouting and yelling and running."

As a result of the commotion on Duffy Square, a crowd was caused to collect, numbering approximately 2,000.

Officer McNulty testified that defendant Meisner "was running around • • • calling to others, shouting that they did not have to leave; that they could stay". The officer told Meisner, "he must keep moving and not to try to encourage these people to stay any longer. He continued to shout that this is America" and was then arrested. De-

fendant Jerome was told to "move away" after he was observed "running from one group to another around the park", behind a mounted policeman who was attempting to disperse the crowd, and shouting that the demonstration was lawful and "the fascist police had no right to stop them". Jerome refused to move and was arrested.

Patrolman Engelhardt testified that he arrested the defendants Shallit and Chadwick. Miss Chadwick "was standing on the sidewalk yelling" to officers who were attempting to remove the defendant Kunis after he lay down in the street, "Leave him alone facists [sic]". Chadwick then sat down on the sidewalk herself, refused to get up, and when the officer "went to pick her up * * * she started punching me and went to bite me". Defendant Shallit was shouting to the demonstrators not to move, calling the police "fascists" and shoving and pushing officers.

Patrolman Coffey testified that defendant Rhoads was screaming and running, and when he refused to leave the Square, he was arrested. As the officer was taking Rhoads to a commandeered cab, "Ostrow came over and told me to leave the defendant (Rhoads) alone"—he (Ostrow) was screaming "fascist cop" and was told to be quiet or he would also be arrested. He refused and was arrested.

Patrolman Campbell testified that after Captain McAllister spoke to Laub about dispersing, Laub, through the megaphone, told the crowd not to break up and called the police "fascist cops". The officer asked Laub "to move off the sidewalk", Laub refused and was arrested.

Officer Hines testified that defendant Copeland spoke to the crowd through a megaphone and "was going back and forth across Duffy Square". Copeland was asked if he had a permit for use of the megaphone, claimed he did

not need one, was ordered to leave the area, refused, and was arrested.

Patrolman Fahy testified that defendant Kunis was "yelling and screaming 'fascists, police brutality, gestapo' ", was told to stop or be arrested, ran "into the middle of Broadway and laid down", refused to move, causing traffic to back up, and was arrested and carried to a radio car. Defendant Eckhardt was also "lying" in Broadway, refused to get up, and was assisted to his feet and then arrested.

Patrolman Knoll testified that defendant Gelles was standing on the sidewalk with two others, was told he was blocking traffic and should move, ranted at the officer about "fascist cops", refused to move on, invited his own arrest, and was arrested. The officer was placing Gelles in a cab when he saw the defendant Kyllingstad slap a police sergeant with whom she had been "loudly conversing". She was then arrested.

Patrolman Walsh testified that he arrested the defendants Apter, Martin and Teahan. Apter was running back and forth from street to sidewalk telling the crowd not to obey the police orders, was told to desist, continued his shouting to the crowd, and was arrested. He then threw himself on the ground and, as the officer tried to put him in a cab, defendants Martin and Teahan intervened and attempted to take Apter away while yelling "Police brutality * * * gestapo". They were warned to move away or be arrested, refused, and were arrested.

Upon cross-examination, Officer Walsh testified that in his opinion there were "about 250 to 300" people present at the demonstration, traffic was stalled because "at intervals the crowd would keep running back and forth into the street with placards * * * so, we attempted to get them back on the sidewalk, to put the traffic through".

Patrolman Annitto testified he arrested the defendants Maher and Turner. Maher was "running around * * * waving a placard. He struck a police horse with the placard" and was arrested. "Turner was screaming and hollering and trying to keep two policemen from keeping the prisoner they were trying to bring to the car".

Defendant Philip Luce, the first witness called by the defense, testified that he arrived at Duffy Square on August 8, 1964, at approximately 3:45 P. M. He was an organizer and leader of the meeting and about 10,000 leaflets had been distributed around the city announcing the meeting. Before the speeches started, Luce and some others present were told by a uniformed policeman:

> "* * * that we could not hold a meeting there; that there was a ban on demonstrations in Times Square; that we could move either north of 59th Street or south of 40th Street and hold a meeting; but that no meetings would be allowed within that area."

Luce further testified that about 20 or 25 people were given identifying arm bands and were placed around the perimeter of the Square "in charge of keeping the crowd orderly" and preventing people from going out into the street. About 100 to 150 people were gathered at the Square for the speeches. Laub opened the meeting by stating it would be "a peaceful, orderly meeting", introduced him (Luce) and he spoke briefly on behalf of the "May 2nd Movement". Luce then turned over the meeting to Copeland. The people assembled did not push, shove, fight or carry weapons. "The entire assembly" was on the Square, not on the street, and there was no interference with vehicular traffic. After Copeland had spoken for 15 or 20 seconds, a police officer

informed them that the meeting was illegal and had to be terminated. Copeland continued speaking and Laub then repeated the officer's command to the crowd. There was no disturbance until suddenly about 12 foot police appeared and two mounted police rode into the crowd and arrests were made.

Upon cross-examination, Luce testified that he, Laub, and Copeland used the megaphone and it was possible that some people were on the street as well as the sidewalk.

Joseph Lelyveld, a New York Times reporter, was called for the defense and testified that he arrived at Duffy Square shortly before 4:00 P.M. and none of the demonstrators had yet arrived. About 15 minutes or half an hour later, people with signs arrived, some distributing leaflets, and the speakers, standing on the steps, began the proceedings. There were no more than 60 people listening and they were all compactly on the sidewalk of the Square. The situation became chaotic after the police requested the crowd to disperse, and several people started speaking at once, protesting the police order and announcing defiance of it, after which the police moved in. The witness did not think there was any interruption with traffic prior to the police moving in to disperse the crowd. The number of people on Broadway and Seventh Avenue seemed normal for a Saturday afternoon in the summer of 1964.

Upon cross-examination, Lelyveld testified that as the meeting was being dispersed, "traffic was pretty well stopped, because prowl cars were converging on the park and all empty taxicabs were being stopped". The witness saw a girl hit a policeman and a boy lie down and hold himself stiff while being carried into a police car. He did not recall seeing any of the demonstrators on the street although he was unable to observe the entire area.

Defendant Albert Maher testified that he hit a police horse with a rolled-up placard in order to make it shy away and to prevent it from stepping on a person who had fallen to the ground. The witness estimated the size of the gathering at about 100 people.

Defendant Ostrow testified he was given an arm band and designated as a monitor to help maintain order and keep those attending the meeting within Duffy Square itself and not out on the street. He estimated there were between 80 and 100 people present.

Defendant Teahan testified that he saw Kunis lying on the sidewalk (not the street) and then being carried by the police to a car. He alleged he was pushed around by several policemen, finally being pushed into the road in front of a squad car and was then "grabbed" by an officer, who said, "Come along with me" and took him to a commandeered cab, put him in and "proceeded to punch me in the mouth, with two witnesses (defendant Martin and Officer Walsh) present". He denied trying to pull the defendant Apter away from Officer Walsh.

Defendant Martin testified he had come to the meeting to speak, and, after seeing Copeland and Meisner led away by the police, he followed and:

> "* * * was approached by an officer who said, 'Do you want to go too, Bud?' and I could see him only out of the corner of my eye. I reeled a little bit, and he grabbed me under an arm; and another officer grabbed me under this arm; and they carried me to a cab, where the defendant Apter and Patrolman Walsh were already in; and they threw me in the front seat."

Martin denied having interfered with the arrest of defendant Apter, but admitted he "may have" yelled things,

like "fascist police", "brutality", etc. He also denied resisting arrest but claimed he was in severe pain because the police were poking him in the kidneys.

Defendant Apter denied sitting or lying down in Duffy Square. He was a monitor with an arm band, designated to keep order and prevent people from "spilling into the street or obstructing traffic". He admitted he was running around and screaming "fascist cops".

Defendant Eckhardt testified that he had followed defendant Kunis as Kunis was being carried to a patrol car after sitting down on the sidewalk. He was not taken to the car or even touched by the police and was told he was arrested after arriving at the station house. He denied lying down on the street.

Defendant Chadwick testified that she saw defendant Kunis either lie down or sit down on the sidewalk and then lifted and taken to a patrol car by the police. She never saw Eckhardt sit or lie down. She admitted trying to bite Officer Engelhardt but did not believe she punched him.

Defendant Kunis testified that he sat down on the Square. He saw horses "turning in circles around, knocking people all over, and policemen on the horses swinging their clubs at people" and "I had no other recourse but to sit down and refuse to cooperate with the people inflicting what I saw upon the crowd". Upon cross-examination, Kunis admitted that "when the police came to take me I went completely limp and laid down"—on the sidewalk, not on the street. His body was in a stiff position while being carried and he did not intend to coopérate with the police.

Defendant Kyllingstad testified and denied that her "actions could have been construed as slapping a police officer". She admitted she struck an officer on the back in the

course of attempting to convince him not to arrest defendant Laub.

Defendant Meisner testified he made no noise prior to the time the police began dispersing the crowd, but then yelled, "Let them speak" and may have shouted "that they did not have to leave; that they had a right to speak; that that was a constitutional right". He denied having refused an officer's request to leave the sidewalk.

Defendant Turner testified he was not a member of any sponsoring organization but was asked by Laub and agreed to serve as a monitor to "help maintain order, to allow for pedestrian traffic, and to keep people out of the street". He estimated that "possibly 100 people, and no more, were in attendance at the meeting" prior to the arrival of the police. After the order to disperse, the crowd was chanting "Let them speak". He added:

> "Well, the chanting continued for about—no more than a minute and a half, when nothing happened, when the Captain and a few patrolmen who were in a line across the front of the steps left the scene; and, suddenly, the patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square."

Upon this appeal, defendants-appellants argue: (1) that the record fails to show "substantial interference with normal traffic movements" prior to the police order to disperse so that there was no violation of Penal Law, Section 722 and therefore, the order to disperse was without au-

thority and failure to obey it was not unlawful; (2) the order to disperse was an unwarranted interference with appellants' constitutional rights to freedom of speech and peaceful assembly as those rights have been enunciated by the United States Supreme Court; (3) if Captain McAllister's order was based on a general police ban of all meetings and demonstrations in the area, "such a ban over an extensive area for an indefinite time is clearly unconstitutional"; (4) under the circumstances, both the meeting and appellants' failure to obey the order to disperse were constitutionally protected conduct; (5) evidence of any of the appellants' conduct following their refusal to obey the order to disperse may not be considered in support of their convictions; and (6) subdivisions 2, 3, and 4 of Penal Law, Section 722, as applied to street meetings, are so vague and uncertain as to be violative of due process of law.

Firstly, let it be said that the evidence in the record of a general police ban on meetings in the area is, at best, very sketchy and would clearly be an insufficient basis upon which to premise the prosecution's case.

Secondly, although the prosecution introduced evidence that Duffy Square was technically a "park" and that Park Department Regulations require a permit for public meetings, it is clear that such evidence was not subsequently relied upon in any fashion and is not urged as a basis for sustaining the convictions here. This aspect of the case will not be considered.

Thirdly, while subdivisions 2, 3 and 4 of Penal Law section 722 contain terms which are general and may be subject to differing interpretations, it need not follow that

they are, therefore, too vague and indefinite to adequately provide guide lines for appropriate and inappropriate conduct at street meetings. The provisions of these subdivisions have been many times the ready subject of reasonable construction and application to public behavior, oftentimes proscribing it, while frequently rejecting, as unlawful, its inhibition (see e.g., People v. Bogin, 248 N.Y. 530; People v. LoVecchio, 185 Misc. 197; People v. Hussock, 23 N.Y.S. 2d 520, cert. den. sub. nom. Hussock v. New York, 312 U.S. 659).

It should be noted that it is unquestioned that evidence of a violation of any subdivision of section 722 of the Penal Law will support a conviction thereunder, regardless of whether the complaint charges a defendant under one particular subdivision or another (People v. Carcel, 3 N Y 2d 327, 331; People v. Hipple, 263 N.Y. 242, 244). Such being the case, the convictions would be proper if based on proof of conduct violative of any subdivision and it is clear that the trial court may have convicted certain defendants on the basis of conduct after the police order, and others for their conduct prior thereto. There is therefore no substance to the contention that conduct after the order may not be considered because the trial court may have found certain defendants guilty without proof of any such conduct. Further, there is ample in the wording of the complaint to justify sustaining the charges by evidence of conduct after the order. The complaint charges unlawful congregating, obstruction of pedestrian and vehicular traffic, noisiness, causing a crowd to collect, and a failure to follow the police order to disperse. Clearly defendants' conduct after the order is material and proper in showing the failure to obey it. I believe such proof to be proper

within the charges for violations falling under subdivisions 2 and 4 also.

We come then to the heart of the case—the lawfulness of the defendants' conduct and the appropriateness of the police command. Treating initially the charged violations under subdivision 2, our Court of Appeals has frequently weighed the nature and effect of a defendant's conduct as judged by the standards of this provision of Penal Law, section 722. As stated by the Court (per Burke, J.) in People v. Carcel, 3 N Y 2d 327, at pages 331, 332:

> "• • • The common-law definition of 'breach of peace', though not controlling, is helpful in ascertaining the nature of the acts proscribed by the statute. In *People* v. *Most* (171 N.Y. 423, 429) it was defined as a 'disturbance of public order by any act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.' (See *People* v. *Perry*, 265 N.Y. 362, 364; *People* v. *Pieri*, 269 N.Y. 315, 322; *Cantwell* v. *Connecticut*, 310 U.S. 296, 308.) Guided by this definition, the courts have indicated that *something more than a mere inconveniencing of pedestrians* is required to support a conviction under subdivision 2. As was stated in *People* v. *Nixon* (248 N.Y. 182, 187-188), 'Men and women constantly congregate or walk upon the streets in groups, quite oblivious of the fact that in some degree they are thereby causing inconvenience to others using the street. A public meeting may have aroused such interest that groups of men and women continue the discussion while walking up and down the street. Groups linger in quiet social converse after the religious edifice where ser-

vices have been held is emptied. School children and college youths, laborers, athletic "fans" and church members, perhaps even judges, do at times congregate or walk upon the streets in numbers sufficient to cause other pedestrians to stand aside or step into the roadway. Surely such conduct is not always "disorderly" and does not always tend to a breach of the peace.' In the *Nixon* case it was held that there was insufficient evidence to warrant a conviction under subdivision 2 of section 722, although it was shown that the 20 defendants were parading on a New York City street 4 abreast on a sidewalk only 12 feet wide. 'The regular amount of traffic was just barely getting through' (p. 185) and the obstruction caused by the pickets was such that some people were caused to enter the roadway to pass. Certainly the evidence against defendants in the case at hand was no more impressive than that offered by the People in the *Nixon* case. There is absolutely no showing here that defendants caused any *serious* annoyance to pedestrians or that their manner was threatening or abusive. Indeed, the only evidence upon which the conviction might be predicated was the arresting officer's simple statement that, the defendants 'were blocking the pedestrians' right of way'. That evidence we hold to be insufficient (*People* v. *Nixon, supra; People* v. *De Cecca,* 6 Misc 2d 213; *People* v. *Kieran,* 6 Misc 2d 245; *People* v. *Barisi,* 193 Misc. 934, 935; *People* v. *Lo Vecchio,* 185 Misc. 197)." (Emphasis supplied.)

It is difficult to precisely define just how "serious" the annoyance or interference must be and the evidence did not clearly establish which, if any, of the defendants could be

deemed in violation of this subdivision (2) prior to the order to disperse, but the testimony of the arresting officers, apparently deemed credible by the Trial Court, reciting the individual defendant's conduct after the order, would, in my view, abundantly support the convictions under subdivision 2 of all save perhaps Laub and Copeland. Kunis, Chadwick, Eckhardt and Apter all lay down or sat down; all but Eckhardt were yelling and screaming and inciting to disorder. Meisner, Jerome, Shallit, Rhoads, Ostrow, Gelles, Kyllingstad, Martin, Teahan, Turner and Maher were running about interfering with police officers, shouting and screaming and generally causing bedlam. All these defendants clearly acted "in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others".

For me, it would be difficult, if not impossible, to justify this conduct even were it determined that the police order was improper and without lawful authority. While it is clear that "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution" (Wright v. Georgia, 373 U. S. 284, 291-292; Henry v. City of Rock Hill, 376 U. S. 776), there is no support for the proposition, seemingly advanced here, that if the order were improper, any and all of defendants' subsequent conduct would be cloaked with an immunity to arrest. I do not believe the order to be improper, but quite aside from the import of a refusal to obey that order (a violation of subdivision 3 discussed *infra*), the defendants are properly chargeable with the nature and consequences of their acts. Even a completely unlawful police arrest will justify only "reasonable resistance" (People v. McNeil, 15 N Y 2d 717). An unlawful arrest would afford a defendant

> "the right to resist and use 'force and violence' against the officer 'in preventing or attempting to prevent an offense against his person' provided such 'force or violence used [was] not more than sufficient to prevent such offense' (Penal Law, § 246, subd. 3)" (People v. McNeil, 21 A D 2d 1, 2, affd. 15 N Y 2d 717).

But this does not sanction the conduct set forth here in defiance of a police order to disperse—not in defiance of an unlawful arrest and, in fact, prior to any arrest. Most emphatically, it cannot justify the conduct of those who sought to protest the arrests of others. There were no arrests made before the defendants conducted themselves in the manner set forth above and not before all of them were repeatedly warned to desist (cf. People v. Nixon, 248 N.Y. 182, where the arrests were made without warning). This is simply not a case where the convictions depend upon the conduct of the defendants in resisting an unlawful arrest (cf. People v. Cherry, 307 N.Y. 308).

In People v. Sara E. Penn et al, Appellate Term, February, 1964, No. 45, affirmed 16 N Y 2d 581, motion for reargument denied —— N Y 2d ——, September 30, 1965, this Court upheld convictions under subdivisions 2 and 3 based upon (1) the defendants' conduct in darting and sitting in front of and under trucks, thereby interfering with their movements and causing them to stop, and (2) the defendants' refusal to move when ordered to do so by the police. As was stated in the majority opinion in Penn:

> "While it is true that the Supreme Court of the United States has held that public grievances are within the constitutional protection of the First Amendment, it has also held that the manner of protest

is subject to reasonable regulation and control in the interest of public safety and order. (Cox v. New Hampshire, 312 U.S. 569; Giboney v. Empire Storage Co., 336 U.S. 490; Cantwell v. Connecticut, 310 U.S. 296). Also see: People v. Galamison, 43 Misc. 2d 72; People v. Martin, 43 Misc. 2d 355.

"In Cox v. New Hampshire, supra, at p. 574, The Court said:—

" 'Civil liberties as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * *'.

"In Giboney v. Empire Storage Co., supra, at p. 498, the Court said:—

" 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to * * * conduct in violation of a valid criminal statute. We reject the contention now. * * *'.

"In Cantwell v. Connecticut, supra, at p. 308, the Court said:

" 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. * * * '."

See also Schneider v. State, 308 U.S. 147, where the Supreme Court struck down unconstitutionally restrictive ordinances against the dissemination of information or opinion but stated at pages 160-161:

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all

traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

In the instant case we have no attempt to improperly limit opinion or its public expression. This was no effort to restrict, unconstitutionally, freedom of religion or dissemination of religious views (Cantwell v. Connecticut, 310 U.S. 296); nor to discriminate between conformist and nonconformist views; nor was there evidenced any form of prior restraint (cf. Burstyn v. Wilson, 343 U.S. 495; Kunz v. New York, 340 U.S. 290; Niemotko v. Maryland, 340 U.S. 268; Saia v. New York, 334 U.S. 558; Rockwell v. Morris, 12 A D 2d 272, pp. dism. 9 N Y 2d 791, cert. den. 368 U.S. 913). The conduct of the defendants here may not be properly likened to peaceful picketing and, as was noted in the dissenting opinion in *Penn*, the defendants there had not impeded street traffic and they had demonstrated in a private driveway rather than a public street—facts cogently different from those presented here.

Further, as stated above, I believe the police order to have been proper. Our state courts have upheld *reasonable* action of the police in seeking to disperse street meetings in areas where a breach of the peace or possibility of disorder may arise—especially in heavily-trafficked areas where

vehicles and pedestrians are or may be obstructed (People v. Feiner, 300 N.Y. 391; People v. Hipple, 263 N.Y. 242; People v. Kunz, 205 Misc. 316; People v. Friedman, 14 N.Y.S. 2d 389). The police, in performing their duties,

> "* * * may give reasonable directions. Present at the point where the defendants were congregating they might early sense the possibility of disorder. Even a protest from pedestrians who were annoyed by the defendants' conduct might be a significant element in determining whether persistence in such conduct was wrongful" (People v. Nixon, 248 N.Y. 182, 188-189).

See also, People v. Galpern, 259 N.Y. 279, 281. As was most aptly stated by the United States Supreme Court in the recent case of Cox v. Louisiana, 379 U.S. 536, at pages 554-555:

> "* * * the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red

light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting *in the middle of Times Square* at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement." (Emphasis supplied.)

In sum, it is my view that the police request to disperse was made in the line of a "duty and responsibility to keep their streets open and available for movement" (Cox v. Louisiana, supra, p. 555), but even if the order were unnecessary or improper, the subsequent conduct of the defendants would nevertheless be unjustified and violative of subdivision 2.

In view of the general police order which was announced to the assemblage, it would seem plausible that all defendants would appropriately be charged with a violation of subdivision 3 of Penal Law, section 722. There is, as well, testimony in the record of specific refusals to obey the order of an arresting officer in the case of all defendants excepting Kyllingstad, Maher and Turner. What then of the propriety of the convictions under this subdivision? Contrary to appellants' assertion, subdivision 3 would not, by its terms, "prohibit all street meetings". It requires both that defendant "congregates with others" and "refuses to move on when ordered by the police". There must be a showing of an actual or potential breach of the peace together with a congregating and refusal to obey the police order. Although those congregating may do so in an orderly and inoffensive way, in the absence of a showing that the police direction "was purely arbitrary and was not calculated in any way to promote the public order", the refusal to obey

violates the statute (People v. Galpern, 259 N. Y. 279, 284-285).

Have recent Supreme Court decisions rendered untenable the interpretation thus placed on subdivision 3 by our State courts? I think not. Appellants rely heavily on Edwards v. South Carolina, 372 U.S. 229, and Cox v. Louisiana, supra, but analysis of the holdings there does not compel a determination that subdivision 3 is unconstitutional either on its face or as here applied.

In *Edwards,* 187 students, protesting discrimination, marched to the grounds of the State House in Columbia, South Carolina. They marched around the grounds, carrying placards, for approximately 45 minutes, and

> "• • • As they entered, they were told by the law enforcement officials that 'they had a right, as a citizen, to go through the State House grounds, as any other citizen has, as long as they were peaceful.'"

Some 200 to 300 spectators had gathered to observe the march and "nobody among the crowd actually caused or threatened any trouble" (372 U.S. at 231). Most importantly "[t]here was no obstruction of pedestrian or vehicular traffic within the State House grounds • • • [a]lthough vehicular traffic at a nearby street intersection was slowed down somewhat [and] an officer was dispatched to keep traffic moving". The police authorities then advised the group that there would be arrests unless they dispersed within 15 minutes.

> "• • • Instead of dispersing, the petitioners engaged in what the City Manager described as 'boisterous,' 'loud', and 'flamboyant' conduct, which, as his later

testimony made clear, consisted of listening to a 'religious harangue' by one of their leaders, and loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail." (372 U.S. at 233).

The Court, in reversing convictions based on a breach of the peace under State law, specifically stated:

"We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. See *Cantwell* v. *Connecticut,* 310 U.S. 296, 307-308; *Garner* v. *Louisiana,* 368 U.S. 157, 202 concurring opinion). These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not suspectible of exact definition.' And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection."

In other words, the thrust of the Court's holding, under facts markedly dissimilar from those with which we are

confronted, was to vitiate a statute which was aimed at and employed for the purpose of inhibiting, by means of criminal sanction, "the peaceful expression of unpopular views". We have no such case here. There is no claim, nor could there be, that either the statute here involved or the police action taken was meant to restrict the expression of views, popular or unpopular. There is no discriminatory application alleged. Our determination is clearly made by means of "evenhanded application" of a regulatory statute which, reasonably construed, is meant to insure maintenance of order by "limiting or proscribing" certain conduct.

The opinion in *Edwards* specifically pointed out that the fact situation there presented "was a far cry from the situation in *Feiner* v. *New York,* 340 U. S. 315", where the Supreme Court last had an opportunity to interpret and pass upon the validity of subdivision 3 of Penal Law, section 722. In *Feiner,* the petitioner had been convicted in the Syracuse Court of Special Sessions for a violation of Penal Law, section 722, subdivisions 1, 2 and 3. His conviction had been affirmed in the New York Court of Appeals (300 N.Y. 391) and the Supreme Court granted certiorari to determine whether "* * * the conviction is in violation of his right of free speech under the Fourteenth Amendment". The petitioner, in March, 1949, had been addressing a street meeting in Syracuse attended by approximately 75 or 80 people "both negro and white, filling the sidewalk and spreading out into the street". He had been referring derogatorily to President Truman, the American Legion, the Mayor of Syracuse, and other public officials. Police officers observed the scene for a while and, after indications of excitement, restlessness and some pushing and shoving, the officers "stepped in to prevent it from

resulting in a fight". Petitioner was three times requested to stop speaking but refused to do so while "the crowd was pressing closer around petitioner and the officer". The officer then arrested the petitioner and brought him down from the wooden box upon which he was standing. The conviction was premised primarily on petitioner's failure to "obey reasonable police orders" (subd. 3).

The Supreme Court, in affirming, stated:

> "We are not faced here with blind condonation by a state court of arbitrary police action. Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. • • • They found that *the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions.* Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.
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> "• • • This Court respects, as it must, the interest of the community in maintaining peace and order on

its streets. *Schneider* v. *State*, 308 U. S. 147, 160 (1939); *Kovacs* v. *Cooper*, 336 U. S. 77, 82 (1949). We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner." (340 U. S. at 319-320) (Emphasis supplied.)

In *Cox* v. *Louisiana*, supra, appellant, a leader of approximately 1500 students who had peacefully demonstrated in the vicinity of the Baton Rouge Court House, against discrimination generally and particularly the jailing of 23 fellow students, subsequently refused a sheriff's order to break up the demonstration as it was about to move uptown to several luncheon counters to protest discrimination there by means of a sit-in. Tear gas dispersed the demonstrators, and the following day appellant Cox was arrested, and later convicted of disturbing the peace, obstructing public passages and picketing before a court house. The Court, in reciting the facts, pointed out that the entire demonstration was orderly and peaceful and there was no obstruction of traffic. There was further evidence that the police had condoned the demonstration at the court house so long as the group remained on the "west sidewalk" and that Cox had kept them there. The only evidence of potential unrest was some "muttering and grumbling" by some whites as Cox spoke of the "illegal arrest" of the 23 students and then asked the crowd to move uptown to the lunch counters and sit in for an hour if they were refused service.

The Court, in reversing the breach of peace and obstructing public passages convictions, specifically held unconstitutional the Louisiana "disturbing the peace" statute (La. Rev. Stat., § 14:103.1), a statute markedly similar to Penal

Law, section 722, subdivision 3, and determined that the case was governed by the holdings in *Edwards* v. *South Carolina,* supra, and *Fields* v. *South Carolina,* 375 U.S. 44, constituting an infringement by Louisiana against Cox's rights of free speech and free assembly. The Court specifically held:

> "• • • Louisiana may not constitutionally punish appellant under this statute for engaging in the type of conduct which this record reveals, and also that the statute *as authoritatively interpreted by the Louisiana Supreme Court* is unconstitutionally broad in scope" (379 U. S. at 545.) (Emphasis supplied.)

The Court pointed out that the demonstration was "very well controlled" and the group was "orderly" and not, according to the sheriff's testimony, "objectionable" before Cox urged them to move uptown for the sit-in. The record further showed that the singing of the students resulted only in some cheering and applause by their 23 incarcerated fellows and the general mood was never "hostile, aggressive, or unfriendly". The Court found the arrest to be falsely cloaked in the power of the State to protect the public safety and order.

It is my view that the Court, in Cox, deemed the statute involved unconstitutional as it had been interpreted and applied in the State of Louisiana. I do not feel that the decision mandates a finding of unconstitutionality for subdivision 3 of our disorderly-conduct statute. (A reading of the concurring opinions in *Cox* v. *Louisiana,* companion case No. 49 [379 U. S. 559], supports this position.) There is no indication that the implicit upholding of the constitutionality of subdivision 3 in *Feiner* v. *New York,* supra, has

been undermined (cf. language of Mr. Justice Clark, 379 U.S. at 589). Clearly, the application of subdivision 3 to the convictions here involved was not an attempt to suppress unpopular views, but was aimed solely at the maintenance of order and the avoidance of obstruction to vehicular and pedestrian traffic. There is no "unlimited power to order people off the streets", but rather an authority to reasonably regulate to avoid actual or potential breaches of the peace in the public interest. There is no evidence that administration of the statute here has been "otherwise than in a fair and non-discriminatory manner which the State court has construed it to require" (Cox v. New Hampshire, 312 U. S. 569, 577). Finally, it should be noted that the Court of Appeals in affirming this Court's determination in *People* v. *Penn*, 16 N Y 2d 581, was aware of the decision in *Cox* v. *Louisiana*, (see 16 N Y 2d at 582) and specifically held that there was no denial of the defendants' constitutional rights.

I am of the view that subdivision 3, as applied, remains constitutional and that the convictions are valid under both that subdivision and subdivision 2.

The judgments of conviction are affirmed.

CONCURRING MEMORANDUM

CAPOZZOLI, J.:

There is no doubt about the fact that each and every citizen is immune from arrest and prosecution if he engages in a peaceful, orderly and lawful demonstration for the purpose of dramatizing grievances or to call attention to political views. But demonstrations conducted in a disorderly and unlawful manner resulting in deprivation of the rights

of other citizens, are not to countenanced and cannot be justified under the law.

In the case at bar, by virtue of the guilty verdict rendered by the court below, it must be concluded that the court found that the behavior of these defendants, and others, before the police ordered the termination of the meeting, was interfering with pedestrian and vehicular traffic. In view of that fact the police officers were duty bound to protect the public and were acting legally when they sought to end the meeting. (People v. Sara E. Penn, et al., Appellate Term, First Department, February 1964, No. 45, affd. 16 N Y 2d 581.)

Under the circumstances disclosed in the record the conviction was justified and must stand.

DISSENTING OPINION

HOFSTADTER, J.:

I dissent.

The 17 defendants were convicted of disorderly conduct (Penal Law, 722 [2, 3, 4]) under a single, omnibus complaint charging that on August 8, 1964, at 4:25 P.M., they unlawfully assembled at Duffy Square, "obstructing the area to the exclusion of those wishing to use the same" and delayed "vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered [by the police] to move on the defendants did fail to do so, after being informed that their actions were not lawful". None of these charges were established upon the trial, except only the admitted refusal of the defendants to disburse when ordered to do so by the police captain in charge of ten patrol-

men, two mounted officers and a sergeant. Implicit throughout the record is that the police had decided to prevent the meeting before it assembled, though proof of this predetermination was erroneously foreclosed by the trial judge.

On this appeal, the People urged, and my brethren have accepted, as the basis for affirmance, the defendants' defiance of the police order and matters subsequent to it and attendant upon its forcible execution. I cannot agree; for this predicate of affirmance is without validity in divers aspects. The occurrences now offered as a basis for upholding the convictions were not the subject of the complaint charged. And the events, including any alleged disturbance by any defendant, ensuing upon the order, were the direct and immediate issue of a misconception by the police of the lawful warrant and scope of their authority.

The "May 2nd Movement" is a "peace" organization formed at Yale University. At 4 P.M. on August 8, 1964 it undertook to hold a rally at Duffy Square to protest against American involvement in the Viet Nam war. A captain of police ordered the group to disperse within five minutes after a speaker sought to introduce a chairman for the meeting. Nothing of substance had yet been uttered by either. No one had indicated any purpose other than by word of mouth to draw attention to the sponsors' opposition to the Viet Nam war. All was peaceful—neither pedestrian nor vehicular traffic had been perceptibly slowed—certainly, neither was halted.

When defendants refused to terminate the rally, the captain ordered his men on horseback and on foot to disrupt the assembly. Within 20 minutes after its inception, the order was executed; and the defendants were arrested and charged with disorderly conduct.

But, meetings such as this one are fully protected by the First and Fourteenth Amendments (as well as by the State Constitution—Article I, sections 8, 9). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public; and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (Hague v. C. I. O., 307 U. S. 496, 515; Kunz v. New York, 340 U. S. 290, 293; Cox v. Louisiana, 379 U. S. 536, 555). Before a rally may be dispersed, the speakers must have passed the bounds of argument or persuasion and undertaken incitement to riot (Feiner v. New York, 340 U. S. 315, 321).

Only "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears", may the State interfere with a demonstration (Cantwell v. Connecticut, 310 U. S. 296, 308). Absent these elements, a demonstration may not be arrested (Edwards v. South Carolina, 372 U. S. 229; Fields v. So. Carolina, 375 U. S. 44; s.c. 372 U. S. 522). No such conditions existed during the instant demonstration. Hence, the police were without warrant to proscribe or disrupt it. The order and action thereon had no justification; the resultant disturbance was part of the *res gestae* engendered by them—culpability for which is imputable to the police—not to the defendants.

The orders of the policemen could not make the conduct of the defendants, otherwise lawful, unlawful. "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution" Wright v. Georgia, 373 U. S. 284, 291-292; Henry v. City of Rock Hill, 376 U. S. 776; People v. Collins, 44 Misc 2d 430, affd. 16 N Y 2d 554; see also Lombard v. Louisiana,

373 U. S. 267; Shuttlesworth et al. v. City of Birmingham, 373 U. S. 262; Johnson v. Virginia, 373 U. S. 61; People v. Galpern, 259 N. Y. 279, 281). Enforcement of the law must itself be lawful to serve as predicate for criminal charges.

The commotion which inevitably ensued was the result of the gratuitous and forcible invasion of the rally by the police—not of the conduct of the defendants. Confronted with the police assault, defendants could legally do what was reasonably necessary to resist the unlawful aggression (Penal Law § 246[3]; People v. Allen, 15 N Y 2d 558, 559; People v. Dreares, 15 A D 2d 104, affd. 11 N Y 2d 906; People v. Cherry, 307 N. Y. 308). "Lacking the essential warrant, having abused the authority which was their trust, the officers stood bereft of their usual prerogatives" (People v. Cherry, *supra,* at p. 311). In this context, defendants were liable to criminal sanctions only if they pursued a "counterattack merely for the sake of revenge or the infliction of needless injury" (People v. McNeil, 15 N Y 2d 717, 718). The record shows none; indeed, it renders it manifest that the efficient, moving cause of any disturbances was the unlawful police action.

Apart from these considerations, egregious error is compounded by affirmance founded on any alleged disturbance —by *some* defendants—following the dispersal order. Whether, in the case of any defendant, his conduct went beyond permissible protest is not before us, nor was it before the trial court. The complaint was not founded on any such claimed conduct. By it, none of the defendants were charged with assault or physical attack on policemen; none were accused of resisting arrest; none were charged with counterattacking the police. The only omnibus charge made against all—who were tried jointly—was that they

had congregated at Duffy Square illegally; had impeded traffic; had caused a crowd to collect; and when ordered to move on, failed to do so. The evidence utterly fails to sustain this complaint.

It assumed the validity of the unlawful order. This ill-founded assumption taints the entire record. In the main, the evidence adduced on the trial was tangential, if not wholly irrelevant, to the only issue which could be properly agitated under the complaint, i.e.: the conduct of the defendants *before* police intervention. We may not perpetuate its vice here. The complaint was not adequate to sustain the charges upon which conviction was rendered by the trial court nor as the predicate of the offenses now pressed upon us to sustain that judgment.

To charge defendants with one crime and convict them of others is to violate every procedural concept of American jurisprudence. As it is a "violation of due process to convict and punish a man without evidence of his guilt" (Thompson v. Louisville, 362 U. S. 199, 206), "conviction upon a charge not made would be sheer denial of due process * * *. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." (De Jonge v. Oregon, 299 U. S. 353, 362, 365.) The convictions here may not stand—they were not based on charges made; and those set forth in the complaint were not substantiated in the evidence.

Stripped of the immediacies, here a fundamental right was suppressed under guise of preserving order. Judged

in the context of the purpose of the rally, defendants' acts were constitutionally protected (Giboney v. Empire Storage Co., 336 U. S. 490). "The holding of meetings for peaceable political action cannot be proscribed" (De Jonge v. Oregon, supra, 299 U. S. 353, 365). Defendants were entitled to their opinions. Right or wrong, they had the constitutional prerogative—and immunity—peaceably to express them without hindrance by the police. "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views" (Edwards v. South Carolina, 372 U. S. 229, 237). Those who wish to disseminate ideas need not present them first to police authorities for their consideration and approval (Cox v. Louisiana, 379 U. S. 536, 557). As Dean Lohman observed recently "Officers must act as impartial referees to prevent violence". They may not resort to the oppressive use of putative law to stifle peaceful protest!

"Compulsory unification of opinion achieves only the unanimity of the graveyard. * * * the First Amendment * * * was designed to avoid these ends by avoiding these beginnings. * * * Authority here is to be controlled by public opinion, not public opinion by authority." (Board of Education v. Barrette, 319 U. S. 624, 641.) Earlier this year President Johnson told 10,000 college students: "free speech * * * free assembly * * * parades * * * and demonstrations * * * are what you and all other Americans need to stand up for today". He recognized that such freedom of speech—in protest—is the *secret* weapon of an *open* society—the well-spring of its vitality. It nourishes the spirit and practice of civility. Men's instinctual violence—in disagreement—is conducted into peaceful channels. And it is salutary for the State in that it serves as a safety valve in times of stress and strain. Cardozo summed it up

as "the matrix * * * of nearly every other form of freedom" (Palko v. Connecticut, 302 U. S. 319, 327). But speech, to be potent, must be audible. As I had occasion to point out in another context: "A right which is effective only when not needed, is scarcely a right at all" (The Fifth Amendment and the Immunity Act of 1954, 10 The Record of the Assoc. of the Bar 453).

The convictions should be reversed and the complaint dismissed.